United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2405

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GERALD L. HERZFELD,
Plaintiff-Appellee,

—against—

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,
Defendant-Appellant.

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,
Third-Party
Plaintiff-Appellant-Appellee,

—against—

ALLEN & COMPANY, INCORPORATED and ALLEN & COMPANY,
Third-Party
Defendants-Appellants-Appellees,

ALLEN & COMPANY and ALLEN & COMPANY, INCORPORATED,
Third-Party
Counterclaimants-Appellants,

—against—

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,
Third-Party Counterclaim
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANTS ALLEN & COMPANY AND ALLEN & COMPANY, INCORPORATED

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANTS ALLEN & COMPANY AND ALLEN & COMPANY, INCORPORATED

Preliminary

Third-party defendants and counterclaimants Allen & Company, Incorporated and Allen & Company (collectively "Allen")* appeal from portions of a post-trial amended judgment rendered by the United States District Court for the Southern District of New York (MacMahon, J.). The opinion of the District Court is reported at 378 F. Supp. 112.

Allen contends that the District Court:

1. *erroneously* found that Allen was *in pari delicto* with Laventhol;

2. *erroneously* required Allen to contribute to Laventhol $76,500 or half of plaintiff's judgment against Laventhol, notwithstanding that Allen had already paid, in settlement, the sum of $357,000, or 70 per cent of plaintiff's entire claim;

3. *erroneously* dismissed the counterclaims of Allen against Laventhol without reaching the merits, solely on the ground that Allen & Company, Incorporated was allegedly *in pari delicto* with Laventhol.

The District Court held Laventhol and Allen "equally culpable" (231a) for plaintiff's loss, and then inexplicably required Allen to shoulder 85 per cent of the loss and Laventhol only 15 per cent.

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* The judgment below, insofar as it awards contribution, is in favor of Laventhol, Krekstein, Horwath & Horwath ("Laventhol") and against Allen & Company, Incorporated—not against Allen & Company, a wholly separate company. The Third-Party Complaint against Allen & Company was dismissed at trial (301a).

Issues for Review

1. Did the District Court err in holding that Allen was *in pari delicto* with Laventhol?

2. Did the District Court err in failing to credit against Allen's liability for contribution, the amount Allen had previously paid to plaintiff in settlement?

3. Did the District Court err in dismissing Allen's counterclaims without reaching the merits?

Proceedings Below

This action arose out of the purchase in December 1969 by plaintiff Gerald Herzfeld* of two $255,000 units of securities of The Firestone Group Ltd. ("Firestone")** a California-based real estate syndication company. The purchase by plaintiff was part of a $7.5 million private placement (14a). Herzfeld had been eager to invest in Firestone —so much so that he had even secretly utilized a straw man, David Baird, to purchase a second hard-to-obtain unit in the private placement (314a).

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* Actually Herzfeld bought the units on behalf of himself and his brothers. The District Court permitted him at the trial to amend the Complaint to state a claim on behalf of his brothers (489a, 490a).

** "Firestone" will refer herein to the company; "Richard Firestone" will refer to the individual who headed the company.

Laventhol, a public accounting firm, was retained by Firestone for the express purpose of certifying Firestone's financial condition in connection with the private offering (606a). Laventhol's audit was conducted in late November and early December 1969 (909a, 912a), and the report and audited financial statements were issued as of December 6, 1969 (E32). Without Laventhol's report and audited financial statements there would have been no private offering (696a-697a).

Allen, an investment banking firm, assisted Firestone in effecting the private placement (709a), but had no role in the preparation of the audited report and financial statements (695a-696a). Allen itself relied upon Laventhol's report and audited financial statements in agreeing to close the private placement (696a-697a). Indeed, the closing of the private placement was delayed until the report and audited financial statements were issued by Laventhol (696a-697a).

In 1971, two years after the private placement, Firestone filed a petition under Chapter XI of the federal bankruptcy laws (33a).

Thereafter, plaintiff commenced this action under Rule 10b-5 promulgated pursuant to Section 10(b) of the Securities and Exchange Act of 1934, under Section 352-c of the New York General Business Law and under common law against Laventhol, Allen and others (10a-40a). The gravamen of the Complaint was that the Laventhol report and audited financial statements contained material misrepresentations and omitted to state material facts about Firestone (10a-40a).

In 1972, plaintiff and Allen entered into a settlement agreement (62a-65a) pursuant to which Allen paid plaintiff $357,000 (or 70 per cent of plaintiff's total loss of $510,000) in return for dismissal of the action as against all defendants except Laventhol (63a).

Laventhol objected to the settlement (88a-94a) but the District Court (Palmieri, J.) nevertheless permitted the action to be dismissed (71a) as against all defendants other than Laventhol. Judge Palmieri provided, without objection, that the dismissal be on the condition that Laventhol could, if it saw fit, file a third-party action against the other defendants, including Allen, with respect to plaintiff's remaining claims (71a).

Following the settlement, plaintiff filed an Amended Complaint naming Laventhol as the sole defendant (105a-116a). Laventhol thereupon filed a Third-Party Complaint against Allen and others for indemnity and contribution (131a-143a). Allen denied all liability (144a-145a). In addition, Allen counterclaimed against Laventhol as assignee of the Firestone units of eight of the original investors (145a-159a), each of whom was a valued client of Allen. Allen, in purchasing those units, had obtained written and oral assignments of the rights against Laventhol of the eight purchasers (E450-E460; 646a-647a).

The trial was held on 11 trial days in October 1973. By Opinion dated May 29, 1974 (378 F. Supp. 112), the District Court found that the Laventhol report and audited financial statements were misleading because they failed to set forth a number of facts about Firestone and a purported purchase and sale of nursing homes known as the Monterey-Continental Recreation transaction (199a-203a). The Dis-

trict Court also found, incorrectly, that Allen, through its employee Lee Meyer "had knowledge of the misleading nature of the [Laventhol] report" (227a).

The District Court found that plaintiff's damages were $510,000, but credited Laventhol with the $357,000 which Allen had paid in settlement, leaving damages of $153,000 (211a-212a).* The District Court then assessed Allen one-half of this amount, or $76,500, which it required Allen to contribute to Laventhol in addition to the $357,000 which Allen had already paid plaintiff (231a, 1125a). Additionally, on the basis of its conclusion that Allen was *in pari delicto* with Laventhol, the District Court dismissed the counterclaims against Laventhol without reaching the merits (232a-237a).

* In its original opinion (212a) and judgment (257a) the District Court reduced plaintiff's damages by $55,000, the purported value of the two Firestone units. In its subsequent opinion (1117a-1118a) and amended judgment (1130a) the District Court increased the plaintiff's damage award to $153,000 upon a showing that plaintiff had not retained the securities.

The Motion to Amend the Judgment

Subsequent to the District Court's decision, Allen moved, pursuant to Rule 52(b) Fed. R. Civ. P., to amend the judgment to credit Allen with the amount paid to plaintiff in settlement, thereby extinguishing its obligation to make further contribution to Laventhol (1110a-1115a).

The factual basis of the motion was not disputed; if Allen had *not* settled with plaintiff, the final judgment would have been $510,000, of which Laventhol and Allen each would have been required to pay half or $255,000. Because Allen settled for $357,000, the District Court reduced the judgment against Laventhol to $153,000. Yet the District Court also ordered Allen to contribute half of the judgment, or $76,500. Thus, under the District Court's Order, Allen would have to pay $433,500 (or 85 per cent) and Laventhol $76,500 (or 15 per cent) to plaintiff (1112a-1115a).

In a decision dated September 13, 1974, the District Court denied Allen's motion to amend the judgment without reaching the merits. The grounds for denial of the motion were as follows (1116a-1126a):

> 1. that Allen did not plead its settlement with plaintiff as an affirmative defense in its reply to Laventhol's cross-claim for contribution (1123a); as shown below (pp. 32-34), the pleadings were sufficient to raise the issue;
>
> 2. that Allen, in proceedings before Judge Palmieri on the motion to approve Allen's settlement, had asserted that Laventhol could still seek contribution against it, notwithstanding the settlement (1121a-1122a); as shown below (pp. 34-35), because of the

nature of the pleadings and proceedings before Judge Palmieri, Allen's position before Judge Palmieri was not inconsistent with its present position;

3. that "it may well be that Allen's failure to raise this defense earlier prejudiced Laventhol's trial strategy." (1122a-1123a); as shown below (pp. 35-36) this was incorrect since Laventhol itself had pleaded the settlement in its Third-Party Complaint against Allen and emphasized it at the trial;

4. that the defense is purportedly not supported by the evidence (1124a); as shown below (p. 36) this is incorrect since the fact and amount of the settlement was conceded at the trial and further placed before the District Court on the motion to amend the judgment.

The Facts and the Decision Below in Greater Detail as They Relate to Allen

Firestone and the Private Placement:

Firestone was in the business of acquiring land and income-producing properties and reselling those properties primarily through syndication (763a).

Some time in the fall of 1969, Firestone determined to raise additional capital by issuing $7.5 million of stock and notes, in units valued at $255,000 each (E7). Allen was enlisted to assist in finding purchasers for the private placement (E352). Allen insisted that, before consummating the private placement, Firestone's financial statements be audited by a national accounting firm (810a, 811a, 814a). Firestone retained Laventhol to perform the audit (907a).

The Role of Allen:

Some time in 1968, Lee Meyer, who was then an Allen vice president,* met Richard Firestone, the president of Firestone (764a). Thereafter Meyer was invited to sit on the Firestone Board of Directors. It is undisputed that Meyer was Allen's sole contact with Firestone; no other person at Allen had any contact with either Laventhol or Firestone (720a).

In 1969, when Firestone decided to issue securities in a private placement, Richard Firestone asked Allen, through Meyer, to assist with the private placement (178a).

Meyer, Richard Firestone and the Laventhol auditors all testified at the trial. Accordingly, the extent of Meyer's knowledge of the Monterey-Continental Recreation transaction, which was the gravamen of the District Court's holding against Laventhol (199a-202a), is readily ascertainable —without resort to speculation or inference.

Meyer's Contacts With Firestone:

As an outside director, Meyer's role in Firestone was limited. His office was in New York, a continent away from the Firestone offices in Los Angeles (699a). Meyer had no functions with respect to the day-to-day operations of Firestone (698a). His knowledge of Firestone was derived only through reading financial statements and attending Board meetings, speaking occasionally with officers of Firestone and generally observing the company's activity (722a). Meyer spoke periodically with Richard Firestone on the telephone, perhaps once or twice a week (702a).

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* Meyer was a vice president of Allen & Company, Incorporated and had no connection whatever with Allen & Company (694a).

In the fall of 1969, Richard Firestone advised Meyer by telephone that he had arranged for the simultaneous acquisition and disposition of the Monterey properties, and that the person with whom he had been negotiating for the sale of the properties was a man named Ruderian (702a-707a).

That was all that Richard Firestone told Meyer. Thus, on cross-examination, Richard Firestone testified as follows (808a):

> "Q. Mr. Firestone, Lee Meyer didn't participate in your discussions with Mr. Ruderian, did he? A. No.
>
> Q. You didn't send Lee Meyer a copy of the contract with Continental Recreation Company prior to the time of the private placement, did you? A. I doubt it.
>
> Q. You didn't send Lee Meyer any other documentation of the transaction with Continental Recreation Company at any time prior to the private placement, did you? A. I don't think so."

The only other persons at Firestone who could possibly have spoken with Meyer were Martin Scott (a director and vice president of Firestone) and Chester Wadley (Firestone's controller). Wadley testified that he had never even met Meyer and never discussed the Laventhol audit with Meyer (582a). And Scott testified as follows (553a):

> "Q. Did you ever have any conversations with him about the Monterey Nursing Homes transactions or the accounting treatment that was to be accorded to them? A. No.
>
> Q. Were you ever present when Mr. Meyer had any conversations either in person or by phone with anyone else about that subject? A. No, I was not."

Thus, although the private placement was to close on December 16, 1969, Meyer, who was the one who had insisted on audited statements in the first place, was not shown a copy of the Laventhol report and audited financial statements until the day before, virtually the very last minute (976a). Indeed, Robert Feinberg, a partner of the New York law firm of Jacobs Persinger & Parker who was Firestone's attorney*—and a disinterested witness—testified that he had frequent conversations with Meyer in the week preceding the private placement in which Meyer had told Feinberg that he (Meyer) was "concerned" since he "had not received or had not seen the financial statements" (976a).

According to Mr. Feinberg, the first time that Meyer saw the financial statements was at a meeting at Feinberg's office on December 15, 1969 (977a). That meeting was attended by Messrs. Firestone, Scharff and Scott of Firestone, Mr. Feinberg and Mr. Meyer (970a); the others at first met privately after which Feinberg had called Meyer to join them and review the audited financial statement (970a).

Mr. Feinberg described Meyer's position as that of an outsider attempting to elicit information from Richard Firestone, the insider (970a):

> ". . . Attempts were made by Mr. Meyer to get some further explanation concerning the [Laventhol] certified financial statements from the Firestone people who were present . . ."

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* As shown below in greater detail (see p. 24, *infra*), the District Court incorrectly believed that Mr. Feinberg was *Allen's* attorney. The evidence is clear that he was not; he was Firestone's attorney (968a). This error apparently led the District Court to err in assessing Allen's role, as also detailed further below.

This was December 15, 1969, the day before the closing (969a). There is no evidence that Meyer's attempts were successful.

Meyer's Contacts With Laventhol:

According to the Laventhol witnesses, the only contact between Laventhol and Meyer was a telephone conversation which the District Court found took place on December 15, 1969,* just before the report and audited financial statements were released to the purchasers (944a, *et seq.*). This was the only conversation the Laventhol partners ever had with Meyer about the matters at issue (944a, *et seq.*). As already noted, Meyer had just seen for the first time the Laventhol report and audited financial statements (977a). The parties to this telephone call were Arnold L. Lipkin and Charles Chazen (partners of Laventhol; see 602a, 677a, 835a, 872a), Maurice Schwalb (the audit manager for Laventhol; see 908a) and Messrs. Firestone, Meyer and Feinberg (971a, *et seq.*; 944a, *et seq.*).

According to Mr. Feinberg (and the basic thrust of his account is confirmed by the Laventhol witnesses), Meyer wanted to be assured that the Laventhol report and audited financial statements reflected the proper accounting treatment of the Monterey-Continental Recreation transaction (972a). Thus, Mr. Feinberg testified (972a-74a):

> "I believe that the questions with respect to the accounting treatment were propounded by Lee Meyer, and

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* The Laventhol witnesses thought this meeting and a subsequent telephone conversation had taken place "around December 11" not December 15 (861a, 945a); but the District Court correctly found (222a) that it had occurred on the 15th, the day before the closing of the private placement.

those questions were basically whether the treatment afforded to the transaction were proper under generally accepted accounting principles.

"Q. In that telephone conversation with Laventhol, did Mr. Meyer tell Laventhol how to treat this transaction for accounting purposes? A. Not to the best of my recollection. His questions were—what he asked were questions as to whether the accounting treatment was correct and whether it was the only correct accounting treatment, but I have no recollection of anyone in the room attempting to tell Laventhol what to do."

Mr. Feinberg himself, in the presence of Meyer, questioned Laventhol with respect to the *bona fides* of the transaction. Feinberg further testified as follows (972a):

"The question I was particularly interested in was whether or not this was a bona fide transaction, I asked the Laventhol, Krekstein people whether they had in fact seen the documents and gotten an opinion of the California attorney that this was an enforceable transaction on both sides. I was told that they had gotten such an opinion."

Chazen and Lipkin, the Laventhol partners who were parties to this telephone conversation, each testified that Meyer had stated, or argued, that the Laventhol accounting treatment of the Monterey-Continental Recreation transaction was improper (867a, 947a). Thus, Lipkin testified that Meyer had expressed the view that all of the income from the transaction should be reported as earned in the current period, rather than partially deferred. According to Lipkin (947a), Meyer had stated his understanding:

"that it was a completed transaction, there was a sale, and he felt that the proper way to report sales was to report all of the income from the sales." *

Even if this were so, it does not reflect any detailed knowledge of the transactions, but rather only Meyer's conclusion based on what he had been told by Richard Firestone. As Richard Firestone testified, Meyer's position with respect to the accounting treatment was "based on the facts that he had" (805a), which, as already indicated, were only the generalized statements which Richard Firestone had made to Meyer. Significantly, neither Lipkin nor Chazen advised Meyer that the Continental Recreation transaction was *not* a "completed transaction" and that there had *not* been a "sale." Indeed, neither Lipkin nor Chazen disclosed to or discussed with Meyer any of the facts which the District Court found were misleading in the Laventhol report and audited financial statements. In short, Meyer came away from the December 15 telephone conversation with Laventhol with no more information than he had at the start of the conversation.

In any event, Laventhol did *not* change its accounting treatment or rely in any way on Meyer (956a, 890a), and thus the conversation in no way caused or aided any fraud by Laventhol. Lipkin testified as follows (956a):

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* Significantly, on his deposition, which Lipkin signed under oath shortly before the trial, Lipkin had testified about that telephone conversation as follows (986a):

"Q. What did Mr. Meyer say to you? A. I cannot pinpoint any one individual's conversation. I can't recollect with any specificity any one individual's conversation."

"Q. Did you or anyone else at Laventhol rely on Meyer in terms of your decision as to how to treat the transaction with Continental Recreation in the report and financial statements? A. No sir."

Moreover, Meyer made a suggestion to Lipkin and Chazen which, if accepted, would have done much to clarify the Laventhol report and audited financial statements. According to Chazen, Meyer suggested that Laventhol create a schedule which analyzed the deferred income, including the Monterey transaction. Chazen testified as follows (868a):

". . . [Meyer] asked whether at least we could introduce or include in the financial statements a schedule analyzing the deferred gross profit, and I told him that the presentation of the . . . financial statements in our judgment was proper and properly clear."

Thus, by Chazen's own admission, Meyer had suggested that the audited report and financial statements give further detail for the investor's benefit of the nature of the Monterey-Continental Recreation transaction, but Laventhol had summarily rejected his suggestion.

The December 16 Letter:

Feinberg and Meyer were both concerned that the figures in the Laventhol audited report and financial statements were substantially different from figures in an unaudited report which had previously been sent to the purchasers in the private placement (970a). According to Mr. Feinberg, following the telephone conversation with the Laventhol partners, Feinberg and Meyer and the Firestone

people prepared a summary of discrepancies between the unaudited figures and the Laventhol audited figures (974a). Following the preparation of the summary of discrepancies, Meyer left the meeting (974a).

Subsequently, on December 16, 1969, a letter (E28) was prepared under the supervision of and for the signature of Richard Firestone, listing the discrepancies between the audited and unaudited figures and stating *Firestone's* opinion with regard to them (806a-807a). This letter was sent to purchasers in the private placement (807a). There is no evidence whatsoever in the record that Meyer had any role in the preparation of this letter and, in fact, he had no role.

In any event, the letter (E28) specifically *highlighted* the discrepancies between the audited and unaudited statements pointing out, *inter alia,* that (E29):

> "The shift of $1,795,000 of gross profit on this transaction from a current basis to a deferred basis by the auditors has reduced current net income below that originally projected."

The letter also pointed out that net income on the audited statement was only $66,916 as opposed to $315,000 as originally projected. Firestone opined in the letter that "none of these changes have resulted or will result in an adverse change in our financial condition or the results of our operation" (E29).

Plaintiff testified at the trial that although he read this letter, he did not "accept" Firestone's "explanation", (334a), i.e., *that he did not rely on this letter.*

The District Court's Opinion With Respect to Allen:

The District Court found that Allen was *in pari delicto* with Laventhol, based exclusively on the role of Lee Meyer (221a-227a). First, the District Court wove a tenuous web to connect Meyer to the December 16 letter—based on its misconception that Feinberg had been Allen's lawyer when in fact he was Firestone's lawyer (cf. 222a with 968a). The District Court held that Firestone's opinion as stated in the letter "if not blatantly false, was plainly misleading" (223a).

Apparently because of its clearly erroneous finding that Feinberg was "Allen's attorney", the District Court ignored the fact that there is a total absence of any testimony in the record linking Meyer to the preparation of the letter; the undisputed testimony was that the letter was prepared under the supervision of Richard Firestone (806a-807a).

Significantly, the District Court did *not*—and could not—find (1) that Meyer had any role in preparing the letter; (2) that plaintiff relied on the letter; or (3) that any *fact* contained in the letter was false.

The only aspect of the letter which the District Court found misleading was Firestone's *opinion* as to the materiality of the discrepancies (223a). However, the entire factual premise for the opinion was set forth in the letter and the investors were free to agree or disagree with the opinion—indeed, Herzfeld admitted on the stand that he had disagreed with and not relied upon the letter (334a).

Second, the District Court found that Meyer had "unsuccessfully pressured Laventhol to accede to Firestone's demand" that all "income" from the Monterey-Continental

Recreation transaction be reported in the current period rather than be deferred (225a). But the District Court did not explain how this unsuccessful "pressure", even if it occurred,* could possibly give rise to liability, since Laventhol had refused to accept any of Meyer's suggestions. Not one of Meyer's suggestions was included in the Laventhol report and audited financial statements.

Finally, the District Court found that:

> "In light of Meyer's inside knowledge of FGL's [Firesone's] operation and, particularly, the Monterey transaction, we conclude that he had knowledge of the misleading nature of the report . . . " (227a).

As shown below, neither the Opinion of the District Court nor the trial transcript nor the documentary evidence reveals a scintilla of evidence which gives substance to the District Court's characterization of "Meyer's inside knowledge of . . . the Monterey transaction". In fact, it is undisputed that Meyer, an outside director, had never even been shown the contracts or any other documentation on the transactions (808a).

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* As shown above (pp. 12-13), Feinberg, a disinterested witness insisted that Meyer had not pressured anyone but rather merely asked questions of Laventhol. But, regardless, Meyer's "pressure" actually was designed to clarify and would have clarified the statement (p. 15 above).

I.

The District Court erred in holding that Allen was *in pari delicto* with Laventhol.

The evidence in the record does not support the finding of the District Court that Allen was *in pari delicto* with Laventhol.

A. *There Is No Evidence That Allen "Had Knowledge of the Misleading Nature" of the Laventhol Report and Audited Financial Statements:*

The principal basis for the District Court's conclusion that Allen was *in pari delicto* with Laventhol was its view that Allen, through its former employee Meyer, had "inside knowledge of FGL's [Firestone's] operation and in particular with the Monterey transaction" and *therefore* "had *knowledge* of the misleading nature of the [Laventhol] report." (emphasis added.) (227a.)

The District Court thus correctly, albeit tacitly, recognized that Allen could not be held liable under Rule 10b-5 merely because Meyer was an outside director of Firestone, but rather only if some form of *scienter* or actual *knowledge* of Laventhol's fraud on Allen's part were proven. *Lanza* v. *Drexel & Co.*, 479 F. 2d 1277, 1284-89 (2d Cir. 1973) (*en banc*); *Cohen* v. *Franchard Corp.*, 478 F. 2d 115, 123 (2d Cir. 1973) cert. denied 414 U. S. 857 (1973); *Moerman* v. *Zipco Inc.*, 302 F.Supp. 439, 446 (E.D.N.Y. 1969) aff'd on opinion below, 422 F.2d 871 (2d Cir. 1970) reh. denied 430 F.2d 362 (2d Cir. 1970) (*per curiam*); *Harnett* v. *Ryan Homes, Inc.*, 360 F.Supp. 878 (W.D. Pa. 1973) aff'd 496 F.2d 832 (3rd Cir. 1974).

The opinion of the District Court was 62 typewritten pages long, with a detailed analysis of the facts known to and not disclosed by Laventhol. In it the District Court listed *seriatim* 10 specific facts which Laventhol knew which the District Court found should have been disclosed in the audited report and financial statements (202a-203a). By way of contrast, the 62-page opinion of the District Court is completely silent with respect to which, if any, of these 10 facts and what other facts Meyer allegedly "knew" or how Meyer allegedly came to know these facts, or when Meyer allegedly came to know these facts. The Court's statement that Meyer had "inside knowledge of . . . the Monterey transaction" (227a) is a mere unsupported and unexplained broadside.*

1. *Facts contained in documents which Meyer never saw*: The facts which the District Court found (202a-203a) to be omitted from the Laventhol report and audited financial statements were learned by Laventhol from private correspondence between Firestone's management and Laventhol and from internal documents of Firestone which Laventhol had reviewed in connection with the audit. Meyer never saw any of these documents (698a, 808a).

For example, Laventhol learned of Continental Recreation's inadequate ($100,000) net worth and the practice of Ruderian, its principal shareholder, to sell property before paying for it, by means of a private memorandum from

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* This Court has held that where the findings of fact of the District Court were "couched in extraordinarily broad and general terms" they compel a "reviewing court to scrutinize the findings with a sharper eye than is ordinarily appropriate." *Russo* v. *Central School District No. 1*, 469 F.2d 623, 628-29 (2d Cir. 1972), cert. denied 411 U.S. 932 (1973).

Richard Firestone to Mr. Lipkin of Laventhol (Exh. A-3, E386). There is no evidence even suggesting that Meyer ever saw that memorandum.

Similarly, Laventhol learned that the contracts of sale were subject to the interpretation that they were mere "options", that Ruderian had not guaranteed the contract, and that Firestone had not "acquired" title to the nursing home properties by reading the actual contracts of sale (Exhs. A-1 and A-2, E31, *et seq.*). The evidence was undisputed that the contracts had not been shown to Meyer (808a).

Laventhol also learned during the course of the audit that the books of original entry of Firestone did not reflect the Monterey-Continental Recreation transaction (610a-611a). There was no evidence even suggesting that Meyer, who was located in New York, ever saw the books of Firestone, which were in California.

Laventhol also learned other material facts by discovering the absence of documents. Thus, Laventhol did not find a closing statement (615a), title insurance (616a), a deed (609a) or a title search (609a); and Laventhol did not obtain a written legal opinion with respect to the transactions (875a). There is no evidence in the record that Meyer knew what Laventhol had done (or failed to do) in the conduct of its audit.

Since Meyer saw no documentation concerning the Monterey-Continental Recreation transaction, Meyer's knowledge of the transaction (if any) could only have and, in fact, did only come from Richard Firestone or Laventhol.

2. *Firestone and Laventhol told Meyer nothing*: The testimony of Richard Firestone, Martin Scott and the

Laventhol witnesses establishes that Meyer was told nothing which could have led him to know that the Laventhol report and audited financial statements were misleading.

Richard Firestone, testifying as a non-party witness on behalf of Laventhol (762a, *et seq.*), did not specify a single fact which he disclosed to Meyer concerning the Monterey-Continental Recreation transaction. He admitted that Meyer had not participated in any of the negotiations and had no recollection of ever having sent to Meyer (who was Meyer had not participated in any of the negotiations and he located 3,000 miles away in New York) any documentation relating to the transaction at issue (808a).

Martin Scott, Firestone's Vice President, testified that he had never spoken to Meyer about, or been present when anyone else ever spoke to Meyer about, the transaction or the accounting treatment to be accorded the transaction (553a).

Laventhol was suing Allen and, of course, the Laventhol witnesses had an interest in imputing inside knowledge to Meyer. Yet none of the Laventhol witnesses testified that they had told Meyer anything other than that their report was correct and could be relied on. Lipkin and Chazen, the primary Laventhol partners involved, testified that they had confirmed Meyer's impression that the Monterey-Continental Recreation transaction had already been completed as of the time of the audit (867a; 894a; 947a).

Indeed, Chazen admitted that Meyer had requested that Laventhol *expand* its disclosure concerning the Monterey transaction, which gives a clear insight into Meyer's true posture with respect to the Monterey-Continental Recreation transaction. Laventhol refused to do so (868a).

B. *The Alleged Attempt to Influence Laventhol's Accounting Treatment Is a Non-Issue:*

The District Court also found that Meyer "unsuccessfully pressured Laventhol to accede to Firestone's demand that its report show a substantially greater net profit by including all the unrealized profit from the Monterey transaction in the current accounting period" (224a). It is not clear whether the District Court posited Allen's liability for contribution on this finding. If it did, however, the District Court erred, both legally and factually.

Robert Feinberg, the attorney for Firestone in the private placement, clearly dispelled any notion that Meyer had pressured Laventhol.

Thus, Mr. Feinberg, who was a participant in the December 15 telephone conversation between the Laventhol partners and Meyer, testified (974a):

> "Q. In that telephone conversation [of December 15] with Laventhol, did Mr. Meyer tell Laventhol how to treat this transaction for accounting purposes? A. Not to the best of my recollection. His questions were —what he asked were questions as to whether the accounting treatment was correct and whether it was the only correct accounting treatment, but I have no recollection of anyone in the room attempting to tell Laventhol what to do."

Mr. Feinberg's testimony is inconsistent with a finding that Meyer attempted to "pressure" Laventhol (225a). At page 47 of its Opinion (222a), the District Court erroneously referred to Feinberg as "Alien's attorney"; in truth it is undisputed that he was Firestone's attorney not Allen's (968a-969a). But for this error, it seems clear that the Dis-

trict Court could not and would not have found that Meyer had "pressured" Laventhol.

In any event, even if Meyer had attempted to influence Laventhol's accounting treatment, the simple fact is that he never succeeded in doing so. It is inconceivable that liability can flow from such an *attempt* since it had no possible causal connection with the wrongs which the District Court found that Laventhol had committed. It is hornbook law that there must be some direct causal connection between the allegedly wrongful act and the damages suffered by the plaintiff; and this principle clearly remains in securities fraud cases. See, e.g., *Titan Group, Inc.* v. *Faggen*, —— F.2d —— (2d Cir. 1975), CCH Fed. Sec. L. Rep. ¶95,092; *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 238-39 (2d Cir. 1974); *Globus* v. *Law Research Serv., Inc.*, 418 F.2d 1276, 1292 (2d Cir. 1969), cert. denied 397 U.S. 913 (1970); *Werfel* v. *Kramarsky*, 61 F.R.D. 674, 681 (S.D.N.Y. 1974); *Siegel* v. *Realty Equities Corp. of N.Y.*, 54 F.R.D. 420, 424-25 (S.D.N.Y. 1972).

As this Court recently stated in *Shapiro, supra* (495 F.2d at 238-39):

> "We consistently have held that causation is a necessary element of a private action for damages under Rule 10b-5 [citations omitted]. Indeed, we have refused 'to facilitate outsiders' proof of insiders' fraud' by 'reading out of [Rule 10b-5] so basic an element of tort law as the principle of causation in fact' [citations omitted]. This is consistent with 'the basic concept that causation must be proved else defendants could be held liable to all the world' [citation omitted]."

Certainly, so far as Herzfeld and the claim at bar for contribution is concerned, Meyer's alleged attempt to influence Laventhol, even if it had occurred, was wholly irrelevant. Herzfeld never knew of it, and was never affected by it, and Laventhol flatly rebuffed it and adamantly refused to change its accounting treatment in any way at the suggestion of Meyer (868a, 956a, 890a).

C. *The December 16 Letter Is Not a Basis for Liability:*

The District Court appears also to have been incorrectly influenced by the December 16, 1969 letter which Richard Firestone sent to Herzfeld and other purchasers of the Firestone units. The District Court found that this letter "both minimized and obscured the differences between the audited and unaudited financial statements" (222a). But the District Court, because of its aforesaid misconception about the role of Mr. Feinberg, incorrectly linked the letter, which Feinberg and Firestone had drawn (806a-807a), to Allen. The simple facts are that Allen had nothing to do with the preparation of that letter, and further that, in any event, the letter had no influence whatever on the investment by Herzfeld.

1. *Plaintiff did not rely on the letter*: even assuming (contrary to fact as shown below at pp. 28-29), that the December 16, 1969 letter was attributable to Allen, there is no evidence which can support a finding of liability at bar based on the dissemination of the letter.

The undisputed evidence was that, although Herzfeld read the letter, by his own admission, he did not rely upon it. Indeed, Herzfeld affirmatively testified that he did *not* accept the explanations given by Firestone in the Decem-

ber 16 letter. Thus, Herzfeld testified upon cross-examination by counsel for Laventhol (334a):

> "Q. All right, now, the fact is, isn't it, Mr. Herzfeld, that in reading the financial statement to the extent that you read it you accepted whole cloth the explanations that were given in Exhibit 6 [December 16 letter], Firestone's letter transmitting it? A. *Absolutely not.*
>
> "The Court: What was your answer?
>
> "The Witness: *Absolutely not.*" (emphasis added.)

It is now clear that where the defendant sustains the burden of actually showing that a purchaser did *not* rely on a claimed misrepresentation or omission, the reliance element of Rule 10b-5* has *not* been satisfied. *Rochez Bros., Inc.* v. *Rhoades,* 491 F.2d 402, 410 (3d Cir. 1973). Accord: *Titan Group, Inc.* v. *Faggen,* —— F.2d —— (2d Cir. 1975) CCH Fed. Sec. L. Rep. ¶95,092. Note, "The Reliance Requirement in Private Actions Under SEC Rule 10b-5", 88 Harv. L. Rev. 584, 598 (1975).

Herzfeld's foregoing trial testimony shows conclusively that the claimed misrepresentations in the December 16, 1969 letter were not a causal factor in his purchase and thus cannot give rise to liability under Rule 10b-5, as shown above (see pp. 24-25 *supra*).

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* The District Court held that reliance was also a prerequisite under Section 352-c of the New York General Business Law (214a) and under common law (218a) citing Prosser, Law of Torts, Section 108 at p. 714 (3d Ed. 1964).

2. *The letter was not misleading*: The District Court also erred in calling the December 16 letter misleading. The letter actually highlighted the discrepancies between the audited and unaudited figures and specifically called to the attention of the purchasers how the audited figures were less favorable than the unaudited figures which had previously been supplied to them.

For example, the letter specifically pointed out to the purchasers that the audited figures showed only $66,916 in net income, whereas the unaudited figures had shown $315,000 in net income. The letter also specifically called to the attention of the investors that the accounting treatment accorded the Monterey-Continental Recreation transaction had "reduced current net income below that originally projected" (E29).

The only portion of the letter which the District Court actually found objectionable was Firestone's opinion* with respect to the significance of the discrepancies (223a). Every fact upon which the opinion was based was set forth in full in the body of the letter itself, and there is no dispute that the facts were accurate.

3. *Allen did not prepare or participate in the preparation of the December 16 letter*: The District Court imputa-

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* In any event, Allen could not properly be held liable unless Allen *knew* that Firestone did not honestly hold the opinion expressed in the letter or that the opinion was completely unfounded and reckless. *Myzel* v. *Fields*, 386 F.2d 718 (8th Cir. 1967) cert. denied 390 U.S. 951 (1968); *Nicewarner* v. *Bleavins*, 244 F. Supp. 261, 264 (D. Colo. 1965); 2 Bromberg, Securities Fraud, 10b-5, §8.2 (1973).

tion of the preparation of the December 16 letter (E28) to Allen (222a) was undoubtedly due to its clearly erroneous finding that Mr. Feinberg had been Allen's attorney. Thus, the District Court erroneously described Mr. Feinberg as "Allen's attorney at the time the letter was prepared" (222a), although as already noted it was undisputed that he was counsel for Firestone only, not for Allen (968a).

The simple fact is that Meyer, the *only* Allen representative involved, had no role whatever in the drafting of the letter. There is no evidence whatever in the record to sustain a finding that he did. The letter was prepared under the supervision of and was signed by Richard Firestone (806a-808a), not Meyer.

The District Court's error about Feinberg's status further led it to confuse the events of December 15 and 16. The District Court erroneously concluded that since Meyer was present, with others, at a discussion on December 15, he, of necessity, participated in the preparation of the letter of December 16. The District Court wrote:

> "Feinberg, Allen's attorney at the time the letter was prepared, testified that Meyer was present on December 15, 1969, when Feinberg and others began to prepare a summary of discrepancies between the audited and unaudited financial statement . . . *We can conceive of no reason for discussing the discrepancies and preparing such a list on December 15 other than to incorporate the list in the December 16 letter*" (222a-223a). [emphasis added.]

This latter conclusion by the Court is unfounded and without support in the record. It presupposes that at the time the summary was prepared, Meyer knew that a letter was being prepared to be sent to the purchasers— there is no evidence whatsoever to support that assumption.

Mr. Feinberg testified that after the summary of discrepancies between the audited and unaudited statements had been prepared, "Mr. Meyer, as I recall it at that time left . . ." (974a). There is no evidence that as of the time Meyer left, the December 16 letter had even been discussed.

II.

The District Court erred in failing to credit Allen with the amount it had previously paid in settlement.

On the undisputed facts, there is an inexplicable and inequitable discrepancy between the holding of the District Court and the amended judgment which was entered on the decision of the District Court.

The District Court expressly held

> ". . . There can be no doubt that Allen and Laventhol were *equally* culpable. They will thus be held *equally* responsible . . ." (emphasis added) (231a).

But then, although having apportioned the blame equally, and having announced its intention to hold parties "equally responsible," the District Court entered a judgment which requires Allen to pay a total of 85% of plaintiff's full claim and Laventhol 15%.

Even assuming *arguendo* that the District Court correctly held Allen *in pari delicto* with Laventhol, which Allen disputes, (Pt. I, *supra*), the District Court erred in failing (as a minimum) to credit Allen with the amount it had paid in settlement to plaintiff in computing Allen's contribution to Laventhol. When Allen attempted by motion, subsequent to the original judgment, to call this obvious inequity to the attention of the District Court, the District Court ruled that Allen had "waived" any claim to such a credit, and denied the motion without reaching the merits.

A. *The Failure of the District Court to Credit Allen for the Amount Which It Paid in Settlement Was Inequitable and Contrary to Established Precedent and the Public Policy of Encouraging Settlement of Disputes:*

Even if the release given to Allen by plaintiff did not operate as an automatic bar to a claim for contribution by Laventhol, the Court should have credited Allen with the amount which it paid in settlement, thereby removing Allen's liability to contribute at bar. *Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 240 (S.D.N.Y. 1974). See also: *McKenna* v. *Austin*, 134 F.2d 659, 665 (D.C. Cir. 1943); *Blauveldt* v. *Village of Nyack*, 141 Misc. 730, 732 (Sup. Ct. Rockland Co. 1931); David D. Siegel, "Practice Commentaries," #C3019:60, *McKinney's Consolidated Laws of the State of New York*, Vol. 7B on Secs. 3014 to 3100, p. 284 (1974).

Had Allen *not* settled with plaintiff, Laventhol and Allen would each have been required to pay to plaintiff half of plaintiff's compensatory damages or $255,000 plus interest. By settling with plaintiff and paying plaintiff $357,000, Allen unilaterally *reduced* Laventhol's liability to only $153,000 plus interest. Thus, Laventhol has already received a windfall of over $100,000 at the expense of Allen.

In *Sabre Shipping Corporation* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1971), the Court correctly observed that if a non-settling defendant could seek contribution from a settling defendant (at 1346):

> "it would operate to prevent [plaintiff's] receiving prompt recovery since no defendant would settle with him if he was to find himself back in the suit as a third party defendant."

See also: N.Y. General Obligations Law §15-108(b) (eff. 9/1/74).

The salutary policy of encouraging settlement of litigation can best be effectuated by holding that Allen's settlement of Herzfeld's claim as a minimum entitles Allen to a credit against any claim for further contribution.

Quite obviously, if a party cannot, by paying 70 per cent of a plaintiff's claim, escape further liability to joint tortfeasors, then no one would make such a settlement. Certainly, Allen would not have paid plaintiff 70 per cent of Herzfeld's claim had it anticipated being held liable for contribution for the remainder of his compensatory damage claim. If Allen is now required to pay an additional $76,500 plus interest on plaintiff's judgment, Allen will, in effect, have been penalized for settling with plaintiff, and Laventhol will be unjustly rewarded for failing to settle, and will receive an additional $76,500 windfall—even though the District Court expressly held them *"equally* responsible" (231a). This result is obviously inequitable.

B. *The District Court Erred in Failing to Consider the Merits of Allen's Motion to Amend the Judgment:*

The reasons asserted by the District Court for refusing even to consider Allen's motion to amend the judgment are legally and logically insufficient:

1. *Allen did not "waive" the pleading of its settlement as an affirmative defense:* the District Court held that Allen had "waived" its rights to seek an adjustment of the judgment in light of its prior settlement because Allen had failed to plead the settlement as a separate affirmative defense. This was error.

Laventhol's third-party complaint itself pleaded Allen's settlement (137a, para. 17). The details of Allen's settlement were merely evidentiary and, as such, need not have been affirmatively pleaded. Cf. *Dunn* v. *J. P. Stevens & Co.*, 192 F.2d 854, 855 (2d Cir. 1951); *Jenkins* v. *General Motors Corp.*, 354 F. Supp. 1040, 1048 (D. Del. 1973). Certainly Allen's settlement does not fall within the enumerated categories of affirmative defenses contained in Rules 8(c) and 12(b) of Fed. R. Civ. P. Allen did plead as an affirmative defense that "the Third-Party Complaint fails to state a claim upon which relief may be granted" (145a). This was and is the appropriate affirmative defense.

Moreover, the settlement was placed in evidence by Laventhol (348a).* It is well settled that "failure to plead matter which constitutes an affirmative defense does not . . . preclude a party from taking advantage of the other party's proof." Vol. 2A *Moore's Federal Practice*, Sec. 8.27[3] at p. 1853 (2d Ed. 1974); *Oscanyan* v. *Winchester Repeating Arms Company*, 103 U.S. 261 (1881).

In any event, Laventhol could not possibly have been prejudiced by any failure of Allen to plead the settlement more explicitly and in greater detail as an affirmative defense. Laventhol knew that Allen had settled with plaintiff; indeed, Laventhol had opposed that settlement on the motion before Judge Palmieri. Furthermore, the Amended Complaint had specifically referred to the settlement,

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* Allen, as just noted, did plead a sufficient defense in its Answer. Moreover, in addition, at the trial, Allen specifically amended its pleading, pursuant to Rule 15, Fed. R. Civ. P., "to conform to the evidence adduced on trial" (731a-732a). Rule 12(h)(2), Fed. R. Civ. P. specifically provides that the type of defense here at issue can be pleaded for the first time "at the trial on the merits."

giving credit for the settlement against the amount claimed in damages from Laventhol (113a-116a); and Laventhol itself had specifically pleaded the settlement in its own Third-Party Complaint against Allen (137a).

2. *Allen did not take an inconsistent position before Judge Palmieri*: the District Court erroneously found that "Allen's position now is inconsistent with the position it took before Judge Palmieri" (1121a) on the motion to dismiss the original action as to all defendants except Laventhol.

There was no inconsistency. All Allen argued at the time of the settlement was that, *procedurally* speaking, the settlement would not bar Laventhol from *asserting* any claim which it may have believed it had. Thus, Allen's memorandum to Judge Palmieri stated (101a):

> "to the extent that Laventhol *may* be entitled to claim-over against its co-defendants, it can *still assert* such a claim by third-party complaint." (emphasis added.)

(See also: 100a.) Allen never conceded that Laventhol had a valid claim; and in its answer to the Third-Party Complaint it expressly pleaded as an affirmative defense that such was not the case (145a).* The order of Judge Palmieri approving the settlement did *not* hold that Laventhol could recover contribution from Allen under the federal securities laws. Rather, the order addressed itself only to "the *procedural steps* whereby the defendant Laventhol, if it is so advised, can bring a third-party action against any of the settling defendants . . ." (emphasis added) (71a).

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* Indeed, Allen argued strongly before Judge Palmieri that Laventhol had *no* valid third-party claim (81a).

Further, Allen's position at the time of the settlement must be viewed in the context of the proceedings before Judge Palmieri—in particular, the scope and nature of plaintiff's claim at the time. In his original complaint, plaintiff had demanded not only compensatory damages, but $1 million in punitive damages (40a). Thus, notwithstanding Allen's $357,000 settlement payment, it might still have faced a claim for contribution with regard to that claim, even if not on plaintiff's federal securities counts,* possibly on his state and common law counts.

The specific issue which Allen raised in its Rule 52 motion and now raises on this appeal was not before Judge Palmieri. All that Judge Palmieri decided and the only aspect of the matter discussed before him was that "*procedural* steps" (71a) existed whereby Laventhol could *assert* a third-party claim. Judge Palmieri did not concern himself with the merits and did not specify the nature of the third-party action which Laventhol could bring. Rather, his decision approving the settlement merely sought to assure that Laventhol would not be barred from raising any issues it wished to raise by virtue of the settlement. As pointed out above (p. 31) Laventhol received a windfall and was not prejudiced by the settlement.

3. *The fact of Allen's settlement and the amount thereof was not disputed by Laventhol*: the District Court acknowledged that the evidence at trial had established that plaintiff had settled with and released Allen (1124a),** but

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* Cf. *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276, 1292 (2d Cir. 1969) cert. denied 397 U.S. 913 (1970).

** The evidence at trial established that plaintiff had been paid $357,000 in the settlement (348a).

stated that the proof was deficient as to which defendant had paid the settlement figure (1124a). Laventhol's affidavit (251a-255a) in opposition to Allen's motion, however, *did not deny* that Allen had paid plaintiff the entire $357,000, as Allen had claimed. Any technical failure of proof which may have occurred at the trial was cured on Allen's post-trial motion (see 1112a-1114a) and, as a matter of simple equity, should not have been summarily ignored by the District Court. (Cf. Rule 59(a), (d) and (e), Fed. R. Civ. P.).

4. *The District Court unfairly disregarded the evidence of Allen's settlement payment*: it was particularly inappropriate for the District Court to take such a strict procedural position on Allen's motion, since the District Court conceded that it had itself blazed a novel procedural path in awarding contribution in its original decision. Thus, the District Court acknowledged in its Opinion (229a) that, in awarding contribution, it was departing from prior federal precedent which had held that a claim for contribution does *not* lie "'unless a joint judgment has been recovered . . . and the one seeking contribution has paid more than his pro rata share of the judgment.'" *State Mut. Life Assur. Co.* v. *Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202, 212 (S.D.N.Y. 1969) (229a).

Surely, in the light of this prior authority, Allen had a right to assume, or at least should not be penalized for assuming, that the issue of contribution would not be ripe for determination at least until *after* there was a judgment against Laventhol, and that Allen would be permitted to offer evidence of its settlement with plaintiff at that time.

III.

The District Court erred in dismissing Allen's counterclaims without reaching the merits.

Allen asserted counterclaims against Laventhol based on Laventhol's fraud. Allen & Company, Incorporated and Allen & Company were assignees for value of the Firestone units and all rights to sue thereon (E450-E460, 646a-647a, 686a). Allen & Company paid $400,000 for four Firestone units and Allen & Company, Incorporated paid over $325,000 for three and a fraction Firestone units (E450-E460) and all rights to sue thereon (646a-647a, 686a). The District Court dismissed the counterclaims without reaching the merits solely on the ground that Allen & Company, Incorporated was allegedly *in pari delicto* with Laventhol.

Since, as shown in Point I above, Allen was not *in pari delicto* with Laventhol, the dismissal of Allen's counterclaims was error. The judgment of dismissal should accordingly be reversed and the case remanded to the District Court to resolve the counterclaims on the merits.

At the very least, there was certainly no basis for dismissing the counterclaims of Allen & Company (as opposed to Allen & Company, Incorporated) as to which there was no *in pari delicto* finding by the District Court.

CONCLUSION

The portion of the judgment appealed from which awarded appellee Laventhol contribution against Allen in the amount of $76,500 should be reversed, and Laventhol's third-party complaint should be dismissed.

The portion of the judgment which dismissed the counterclaims against Laventhol should be reversed, and this cause should be remanded to the District Court for resolution of the counterclaims on the merits.

Respectfully submitted,

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STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 29th day of April 1975, at 4 o'clock P.M. he served the annexed Brief of Appellants, Allen & Co. and Allen & Co.Inc.
in RE: Herzfeld v. Laventhol, Krekstein, Horwath & Horwath No. 74-2405

upon Blum, Haimoff, Gersen, Lipson & Szabad

Esq(s)., Attorney(s)

for Plaintiff-Appellee

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

270 Madison Avenue, New York N. Y. 10016

that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 29th day of April 1975

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1976

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upon Wilkie, Farr & Gallagher

Esq(s)., Attorney(s)

for Defendant-Appellee:

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